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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BERRY & GORE, LTD.,

Petitioner,

v.

ADMINISTRATOR, ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

Whether the attempt of the Administrator of the Illinois Attorney Registration and Disciplinary Commission to compel production by subpoena duces tecum of voluminous records of a law firm, including the firm's financial records for the purpose of conducting a general audit, in the absence of a specific complaint related thereto and absent clear authority to take such action, constitutes an unreasonable and unauthorized fishing expedition in violation of the firm's rights under the Fourth and Fourteenth Amendments.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

The petitioner, Berry & Gore, Ltd., respectfully prays that a writ of certiorari issue to review the decree of the Supreme Court of Illinois entered in this proceeding on August 18, 1983.

OPINION BELOW

The Supreme Court of Illinois rendered no opinion in this proceeding. The Order of that Court, denying petitioner's motion to quash the subpoena duces tecum at issue, appears in the Appendix hereto.

JURISDICTION

The decree of the Supreme Court of Illinois in this matter was entered on August 18, 1983 and this petition for writ of certiorari was filed within ninety days of that date. Jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, IV:

> The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ILLINOIS SUPREME COURT RULE 752, *Ill. Rev. Stat.* ch. 110A, § 752 (1981):

> (Set forth in Appendix hereto.)

ILLINOIS SUPREME COURT RULE 754, *Ill. Rev. Stat.* ch. 110A, § 754 (1981):

> (Set forth in Appendix hereto.)

STATEMENT OF THE CASE

The petitioner, Berry & Gore, Ltd., is a Chicago, Illinois law firm established as a professional corporation in 1972. Although its practice is general, the firm's emphasis is primarily in the area of personal injury representation. The Illinois Attorney Registration and Disciplinary Commission is the agency established in 1973 by the Supreme Court of Illinois to regulate the legal profession in that state; the respondent Administrator is the principal executive officer of the Commission and bears the responsibility for investigating and prosecuting alleged attorney misconduct.

Although various complaints alleging misconduct have been filed with the Commission by clients or third parties over the years against petitioner or its attorneys, the majority of such complaints have been dismissed; none has resulted in the institution of a formal disciplinary proceeding by the Administrator. Both petitioner and its attorneys have taken the position of full cooperation with the Commission concerning the provision of all available information related to specific complaints filed by clients or third parties. Despite this posture of cooperation, on April 13, 1983 the Administrator, through his Chief Counsel, corresponded with counsel for petitioner "... to delineate the scope of the Administrator's investigation of the law firm of Berry & Gore, Ltd." In part, this correspondence stated:

> We have reviewed all matters relating to the firm and conclude:
>
> —certain pending matters are ready for consideration and may be submitted to the Inquiry Board for decision without further delay;
>
> —additional information is required as to certain pending matters; and

> *—the general practices of the firm, as revealed by all matters, warrant investigation. Such investigation will be conducted under the auspices of file number 83-CI-2510, a new matter.* (emphasis supplied).

In expanding upon this latter statement, the Administrator's counsel further remarked: "A review of all matters instituted against the firm, the information contained therein and the Administrator's general investigation indicates that the firm's general practices in several areas may amount to unethical conduct by attorneys employed by the firm." The "practices" at issue, as alleged by the Administrator, were solicitation of professional employment, aiding the unauthorized practice of law, maintenance of spurious claims, and improper handling of client funds. None of these purported practices was ever made the foundation of a formal disciplinary proceeding against the firm or its members.

Contemporaneously with the April 13, 1983 letter, the Administrator served upon petitioner a subpoena duces tecum issued by the Clerk of the Illinois Supreme Court, which subpoena requested the production of the following documents with respect to the Administrator's new investigation:

> [1] All employment records and records of payment, whether salary, commission or otherwise, by the firm to either Arthur Reuter or Vincent Luisi from January 1, 1978 to the present. Include all original canceled checks reflecting payment to either Reuter or Luisi for any reason;
>
> [2] All lists, ledgers, records or documents of any kind reflecting the name or names of any person or persons to whom money has been paid for referral of potential clients from January 1, 1978 to the present. Specifically to be included is any record of money paid to any such person, and if paid by check, all original cancelled checks reflecting such payment;
>
> [3] All lists, ledgers, records or documents of any kind reflecting the name or names of any and all physicians,

health practitioners and or health treatment facilities to whom the firm has referred ten or more clients since January 1, 1978 to the present; and

[4] All original monthly bank statements and all original canceled checks for any account maintained by the firm into which claim settlement drafts, client funds or client related funds have been deposited from January 1, 1978 to the present.

The scope of attorney discipline in Illinois has historically been limited to specific instances of alleged attorney misconduct—not the "general practices" of a law firm—even subsequent to the establishment of the present disciplinary system. Moreover, unlike other state jurisdictions, the Illinois system has never adopted any provision or rule authorizing a general audit of the financial records of an attorney or firm. In light of the unprecedented nature and scope of the Administrator's investigation, especially with respect to the request for production of financial records for the admitted purpose of conducting a general audit thereof, on June 7, 1983 petitioner filed a motion to quash the Administrator's subpoena with the Supreme Court of Illinois.

Petitioner's motion and supporting memoranda raised the federal constitutional question which forms the basis of this Petition: whether the Administrator's subpoena duces tecum constituted an invalid fishing expedition beyond the scope of his authority in contravention of the Fourth Amendment's prohibition against unreasonable searches and seizures. In response to petitioner's motion, the Administrator simply presumed existence of the necessary authority to investigate a firm's "general practices" and conduct an audit, and presented contested allegations concerning specific instances of suspected misconduct which purportedly established probable cause to embark upon the broader investigation. On August 18, 1983, the Illinois Supreme Court entered an Order denying petitioner's motion without opinion.

REASONS FOR GRANTING THE WRIT

I.

THE RULING OF THE ILLINOIS SUPREME COURT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT ADDRESSING FOURTH AMENDMENT LIMITATIONS ON AN AGENCY'S SUBPOENA POWER.

The Fourth Amendment to the United States Constitution mandates in part: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated. . . ." In the seminal case of *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 209 (1946), this Court noted the "gist" of the Fourth Amendment's protection with respect to a subpoena duces tecum ". . . is in the requirement that the disclosure sought shall not be unreasonable." In elaborating on the reasonableness requirement, the Court established three guidelines: (1) the purpose of the investigation for which the subpoena is issued must be authorized under applicable law; (2) the documents sought must be relevant to the inquiry; and (3) the subpoena must contain a specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. *Id.*

The rationale for this reasonableness requirement has been eloquently stated by Mr. Justice Holmes in *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 305-6 (1924):

> Anyone who respects the spirit of the law as well as the letter of the Fourth Amendment would be loathe to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire. . . , and to direct fishing expeditions into private papers on the possi-

> bility that they may disclose evidence of crime. . . . The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. *It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. . . .*
>
> The right of access . . . is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. *Some ground must be shown for supposing that the documents called for do contain it. . . .* (emphasis added)

See also, *Hale* v. *Henkel,* 201 U. S. 43 (1906).

In *American Tobacco,* the Court affirmed the refusal of the district court to require, on behalf of the Federal Trade Commission, the production by tobacco companies of voluminous documents because the request therefor was overly-broad in terms of the relevant inquiry and thus constituted an unauthorized "fishing expedition" in violation of the Fourth Amendment's proscriptions. Conversely, in *Oklahoma Press, supra,* the Court upheld the actions of the Federal Wage and Hour Administrator in subpoenaing business records of certain publishing companies in order to determine whether the companies were subject to and in violation of the minimum wage requirements of the Fair Labor Standards Act. In balancing the Fourth Amendment tension between private security and the public interest occasioned by the administrative agency's investigation, the Court in *Oklahoma Press* relied heavily on the fact that the agency's authority to compel the requested documentation was clearly established by applicable statute and was exercised pursuant to the manifest intent of Congress. 327 U. S. at 179-98. See also, *United States* v. *Morton Salt Co.,* 338 U. S. 632 (1950).

However, unlike the agency's authority in *Oklahoma Press,* the Administrator's authority to conduct an investigation into the "general practices" of an Illinois law firm is not clearly established. Rather, historically in Illinois, the investigatory authority of the attorney disciplinary system has been limited to specific instances of alleged misconduct. An explained by one commentator:

> From statehood until 1933 the disbarment procedure in Illinois was commenced by the filing in the Supreme Court of an information by the Attorney General, on which the Court issued a rule on the attorney to answer. The first reported disbarment case is *People ex rel. Wright v. Lamborn,* 2 Ill. 122, decided at the December term in 1834, and the information procedure was employed.
>
> The first Supreme Court Rule relating to disciplinary proceedings was not adopted until the September term in 1876. It codified what was the "Information" procedure then in use. It provided for the filing of an Information to strike an attorney's name from the roll of attorneys, "making clear and specific charges, giving time, place and acts of misconduct, with reasonable certainty, signed by the Attorney General or some state's attorney."
>
> The rule was amended on February 13, 1909 to enlarge the persons entitled to sign the Information to the "president and secretary of a regularly organized bar association, either incorporated or unincorporated, or any person aggrieved by the misconduct of the attorney charged." It required the Information to be signed under oath if made by the aggrieved person, and an aggrieved person had to be represented by an attorney.

Murphy, T. J., "A Short History of Disciplinary Procedures in Illinois," 60 *Ill. Bar J.* 528, 529 (1972). By 1938, the Court had amended the disciplinary procedure by deleting the information practice and empowering the boards of the Illinois State Bar Association and Chicago Bar Association to act as Commissioners of the court for purposes of filing and investigating complaints concerning attorney misconduct and making reports and

recommendations to the court as to appropriate discipline. *Ill. Rev. Stat.* ch. 100, § 259.9 (1938). In 1973, the court revised the disciplinary structure and established the Attorney Registration and Disciplinary Commission. *Ill. Rev. Stat.* ch. 110A, § 751 *et seq.* (1973).

Under the new system, an Administrator was appointed whose delineated duties include the following:

> On his own motion, on the recommendation of an Inquiry Board or at the instance of an aggrieved party, investigate *conduct* of attorneys which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute.

Ill. Rev. Stat. ch. 110A, § 752(a) (1981) (emphasis added). The Administrator's authority to obtain compulsory process is established in Illinois Supreme Court Rule 754:

> The Administrator, the Inquiry Board and the Hearing Board are empowered to take and transcribe the evidence of witnesses, who shall be sworn by a commissioner or any person authorized by law to administer oaths. Upon request of the Administrator, the respondent or the Inquiry or Hearing Boards, the Clerk of the Court shall issue subpoenas for the appearance of witnesses and subpoenas to require the production of books, records, papers and other items *relevant to the matters under investigation or to pending cases. . . .*

Ill. Rev. Stat. ch. 110A, § 754 (1981) (emphasis added).

Notably, pursuant to Rule 752(a), the Administrator is empowered to investigate "conduct" of attorneys, not "general practices" of law firms. Under both the current rules and the historical context of attorney discipline in Illinois, his investigatory authority is thus reasonably limited to specific instances of misconduct on the part of Illinois lawyers. Moreover, unlike other state jurisdictions which, recognizing the intrusiveness of such procedure into the inner-workings of a law firm, specifically provide for audits of attorney accounts by rule or otherwise,

the Administrator is nowhere authorized to conduct general audits of a firm's financial records under Illinois law.[1]

Petitioner does not dispute the authority of the Administrator to obtain a subpoena duces tecum in furtherance of his investigation of specific instances of attorney misconduct. However, the Administrator simply does not possess authority to embark upon the "fishing expedition" reflected in the April 1983 subpoena at issue here by conducting a search of petitioner's records, "... relevant or irrelevant, in the hope that something will turn up." *Federal Trade Commission* v. *American Tobacco Co., supra,* 264 U. S. at 306. The Administrator, in effect, seeks to conduct an inquisition into the "general practices" of a personal injury firm without providing the firm's members the opportunity to confront the allegations of specific misconduct upon which the inquisition is purportedly based, contrary to the intent by which the Illinois disciplinary system was established. The Administrator simply lacks authority to

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[1] *See, e.g. Iowa Supreme Court* Rule 121.4; (authorizing audits of attorney accounts); Interpretive Guideline No. 2—Re: Preserving Identity of Funds and Property of Client, *Delaware Code Ann.* DR 9-102 (requiring maintenance of specified records and authorizing spot audits); Rule 1:21-6 of the *Rules Governing the Courts of New Jersey* (requiring maintenance of specific records and authorizing examination thereof by the disciplinary agency); *Washington Disciplinary Rules for Attorneys* 13.1-13.5 and accompanying Regulations and Guidelines (authorizing audits of attorneys accounts); *Maryland Rules of Procedure BV 18* (authorizing audits of attorneys accounts upon a showing of good cause"); *Rules and Regulations of the North Carolina State Bar,* Article IX, § 28 (authorizing audit of specified attorney account records); *Maine Bar Rules,* Rule 7(s) (authorizing audit of attorney accounts after institution of formal disciplinary proceedings); *New Hampshire Supreme Court Rule* 37, § 7 (specifies self-certification of trust account procedures or willingness to submit to compliance audit; authorizes audit of account records by order of Court); *Arizona Rules of Supreme Court,* Rule 29(f) (authorizing audit by order of court); *Florida Rules of Court,* Rule 11.02(4) (authorizing audit of account records "... insofar as they may relate in any way to the transaction, occurrence or client in question ...")

embark upon such an inquisition, and therefore lacks authority to obtain the overly-broad discovery sought.

Clearly, the public has an interest in the effective enforcement of the Code of Professional Responsibility applicable to attorneys. Yet, members of the legal profession also possess recognized interests, which include:

> . . . the interests of men to be free from officious intermeddling, whether because irrelevant to any unlawful purpose or because unauthorized by law, concerning matters which on proper occasion and within lawfully conferred authority of broad limits are subject to public examination in the public interest. *Officious examination can be expensive, so much so that it eats up men's substance. It can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason.* . . .

Oklahoma Press Co. v. *Walling, supra,* 327 U. S. at 213 (emphasis added). The Administrator's present inquiry, unauthorized by law, has attained the level of persecution of petitioner. It is this very danger, contrary to the principles espoused by the Court as set forth above, that the Fourth Amendment was intended by our forefathers to prevent.

This conflict between the Order of the Illinois Supreme Court allowing the Administrator to embark upon an unauthorized fishing expedition, and the laudatory principles inherent in the Fourth Amendment as expressed by the Court, justifies the grant of certiorari to review the ruling below.

II.

THE RULING BELOW HAS DECIDED, *SUB SILENTIO,* A NOVEL AND IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE ADDRESSED BY THIS COURT.

This Court has previously decided that attorneys, like other citizens are entitled to the full protections of the Constitution,

including the right to due process afforded by the Fourteenth Amendment. *See, e.g., In re Ruffalo,* 390 U. S. 544 (1968); *Spevack* v. *Klein,* 385 U. S. 511 (1967); *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96 (1963). In the proceeding below, the Administrator seeks to subpoena the financial records of a law firm for the purposes of conducting a general audit of the firm's client accounts, absent any express authorization for such action. In light of the intrusive nature of an audit, both with respect to the firm and its clients, the adoption of a rule specifically authorizing such activity has been the procedure utilized by various states to empower the applicable disciplinary agency to embark upon an excursion into the inner workings of a law office.[2] Petitioner submits that the limitations imposed by an audit rule are a prerequisite to the conducting of general audits of attorney accounts in order to avoid the potential abuse of such power, utilized without restriction and in possible violation of Fourth and Fourteenth Amendment rights. Moreover, an audit rule provides members of the bar with notice that their accounts are subject to scrutiny by the disciplinary agency. The few state courts which have addressed the propriety of attorney audits rely heavily on the applicable audit rule in upholding such action. *See, e.g., In re Kennedy,* 442 A. 2d 79 (Del. Supr. 1982); *Andresson* v. *Bar Association of Montgomery County,* 305 A. 2d 845 (Md. 1973).

By its Order denying petitioner's motion to quash the subpoena duces tecum, the Supreme Court of Illinois has, *sub silentio,* granted the Administrator unlimited and *carte blanche* discovery powers which are unimpeded by constitutional restraints. Indeed, the Illinois court, by its failure to render an opinion, has attempted to wholly avoid the application of those restraints on the attorney disciplinary process. This avoidance cannot be countenanced, for the issues raised are substantial. Is the investigation by a disciplinary agency, like that of the Stuart's Star Chamber or the Spanish Inquisition, self-defining

[2] See no. 1, *supra,* p. 10.

and thus beyond the purview of the Fourth Amendment? Are attorneys entitled to notice that their client accounts may be audited and should such audits be conducted pursuant to established guidelines under the due process clause of the Fourteenth Amendment?

These issues have heretofore not been addressed by this Court, yet they are of substantial import to the practices of hundreds of thousands of lawyers across the nation. Consideration of such issues warrants the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the ruling of the Supreme Court of Illinois denying petitioner's motion to quash the subpoena duces tecum at issue.

Respectfully submitted,

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APPENDIX 1

August 18, 1983

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THE COURT HAS THIS DAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

M.R. 3093

In re: Berry & Gore, Ltd.

"This cause coming to be heard on the motion of the respondent, a response having been filed by the Administrator of the Attorney Registration and Disciplinary Commission, a reply having been filed by the respondent, and the court being fully advised in the premises;

IT IS ORDERED that the motion to quash the subpoena *duces tecum* of April 13, 1983, is *denied.*"

JH/cjv
cc: Attorney Registration and Disciplinary Commission
(John C. O'Malley, Chicago)

APPENDIX 2

ILLINOIS SUPREME COURT RULE 752, *Ill. Rev.* Stat. ch. 110A, § 752 (1981):

The Court will appoint an Administrator of the registration and disciplinary system to serve at its pleasure as the principal executive officer of the registration and disciplinary system. The Administrator shall receive such compensation as the Court authorizes from time to time.

Subject to the supervision of the Commission, the Administrator shall:

(a) On his own motion, on the recommendation of an Inquiry Board or at the instance of an aggrieved party, investigate conduct of attorneys which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute;

(b) Assist each Inquiry Board in its investigations and prosecute disciplinary cases before the Hearing Boards, the Review Board and the Court;

(c) Employ at such compensation as may be authorized by the Commission such investigative, clerical and legal personnel as may be necessary for the efficient conduct of his office;

(d) Discharge any such personnel whose performance is unsatisfactory to him; and

(e) Maintain such records, make such reports and perform such other duties as may be prescribed by the Commission from time to time.

ILLINOIS SUPREME COURT RULE 754, *Ill. Rev. Stat.* ch. 110A, § 754 (1981):

The Administrator, the Inquiry Board and the Hearing Board are empowered to take and transcribe the evidence of witnesses, who shall be sworn by a commissioner or any person

authorized by law to administer oaths. Upon request of the Administrator, the respondent or the Inquiry or Hearing Boards, the Clerk of the Court shall issue subpoenas for the appearance of witnesses and subpoenas to require the production of books, records, papers and other items relevant to the matters under investigation or to pending cases. The Administrator, the respondent or the Inquiry or Hearing Boards may report to the Court the failure or refusal of any person to attend and testify in response to any subpoena or to produce the items specified in a subpoena *duces tecum*.